85 - 1913

Supreme Court, U.S.
FILED
MAY 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. ____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1985

EDWARD M. BAUER and NICHOLAS DAMER,
Petitioners

v.

COASTSIDE PUBLISHERS AND PRINTERS,
DANIEL DEPP and DEANNA THRIFT,
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

William Flenniken, Jr.
DAMER & STRYKER
321 El Granada Boulevard
P.O. Box 321
El Granada, CA 94018
Telephone: 415/726-5588

Attorneys for Petitioners

8418

QUESTIONS PRESENTED

1. Does a Court of Appeal's sua sponte augmentation of the record on appeal, prior to submission and determination of the case on its merits and without notice to the parties, violate the Fourteenth Amendment due process requirements of notice and opportunity to be heard on the merits of the case?

2. Does imposition of monetary sanctions for an allegedly frivolous appeal, prior to the final determination of the merits of the case, violate the Fourteenth Amendment due process requirement of notice and opportunity to be heard?

3. Does imposition of monetary sanctions for an allegedly frivolous appeal, pursuant to an order to show

cause from the Court of Appeal, violate the Fourteenth Amendment due process requirements of notice and opportunity to be heard, where the Court has augmented the record on appeal without notice to the person ordered to show cause?

PARTIES

The caption identifies all the parties.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	i
Statutes Involved	2
Statement of Case	3
Reasons for Granting Writ	13
A. The writ should be granted because the California Supreme Court has decided three important questions of federal law which have not been, but should be settled by this court (Rule 17.1.(c))	13
B. The writ should be granted because this action meets the procedural requirements for a writ of certiorari	21
Conclusion	29

TABLE OF AUTHORITIES

CASES

Abie State Bank v. Bryan
(1931) 282 US 157, 75 L.Ed. 690,
51 S.Ct. 252 26

Chapman v. Rudd Paint & Varnish Co.
(1969, CA9 Wash.) 409 F2d 635 . . . 15

Fegles v. Kraft
(1985) 168 C.A.3d 812, 214 Cal.Rptr.
380, ___ P.2d ___ 7,8,9

In Re Marriage of Flaherty
(1982) 31 C.3d 637, 183 Cal.Rptr.
508, 646 P.2d 179 20

Mission Denver Co. v. Pierson
(1984) ___ Colo ___, 674 P.2d 363 . 20

STATUTES

California Code of Civil
Procedure, §128.5 3,8,11

MISCELLANEOUS

Federal Rules of Appellate
Procedure, Rule 10(a) 14,15
Federal Rules of Appellate
Procedure, Rule 30(a) 14,15
California Rules of Court
Rule 12(a) 9,16
California Rules of Court
Rule 29 22

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District, Division Five, is unreported and is printed in Appendix A hereto, infra, page 1. The judgment denying review by the California Supreme Court is printed in Appendix A hereto, infra, page 35.

JURISDICTION

The judgment of the Supreme Court of California denying review was entered on December 30, 1985. No petition for rehearing is permitted under the California Rules of Court where review is denied. The judgment of the California Supreme Court became final for purposes of this Petition, on December 30, 1985,

when review was denied. The case was finally concluded on January 13, 1986, when the California Court of Appeal issued its remittitur. The jurisdiction of the Supreme Court is invoked under 28 USC §1257(3).

STATUTES INVOLVED

The constitutional provisions, statutes, and Rules of Court applicable to the within action are set forth verbatim in Appendix A, pp. 21-34. They are the Fourteenth Amendment, United States Constitution; Article I, Section 1, California Constitution; Article I, Section 7, California Constitution; California Code of Civil Procedures Section 128.5; and Rule 12(a), and 29, California Rules of Court.

STATEMENT OF CASE

This Petition arises in a libel action filed by Respondents in the California Superior Court, County of San Mateo, on September 24, 1982.

On September 28, 1983, the trial court, as part of a discovery dispute, filed its written order that Nicholas Damer, counsel for Edward Bauer and the Half Moon Bay Review, Defendants, pay to Arthur Lienwohl, one of the counsel for Plaintiff, the sum of $750.00 "for bad faith and frivolous issuance of subpoena duces tecum."

An appeal was taken from this order in due course by Nicholas Damer on the basis, inter alia, that the trial court's order failed to comply with the portion of Code of Civil Procedure section 128.5, under which the sanctions order was made

and which states that "An order imposing expenses shall be in writing and shall recite in detail the conduct or circumstances justifying the order." (Emphasis added.) It was further contended on appeal that the trial court's sanctions were inappropriate under the circumstances then before the trial court, and therefore the imposition of sanctions constituted a denial of due process and an abuse of discretion (e.g., by denying discovery on an issue tendered by Respondent.)

The record on appeal was designated by the parties and prepared and forwarded to the Court of Appeal in accordance with the applicable Rules of Court. The formal briefing process was completed on September 4, 1984, with the filing of Appellants Reply Brief.

By notice from the Court of Appeal dated June 6, 1985, Nicholas Damer was given the opportunity to request oral argument, and a date for oral argument was tentatively scheduled for July 2, 1985. Letter briefs, updating the parties' postures, were likewise invited. In order to obtain oral argument, Nicholas Damer was required to notify the Clerk by letter within 10 days from the date of the notice. If no request for oral argument was made, oral argument was to be deemed waived. By letter to the Clerk dated June 11, 1985, Nicholas Damer respectfully requested oral argument.

Following Nicholas Damer's request for oral argument, the Court of Appeal issued an order to show cause why sanctions should not be imposed against Damer and Bauer for maintaining an appeal

that is frivolous or taken solely for delay. They were ordered to appear on July 2, 1985 before the Court unless they agreed to submit this issue without a hearing. Although the order to show cause was stamped as though dated and filed on June 11, 1985, the Court of Appeal postage meter stamp on the envelope was dated June 10, 1985, while the U.S. Postal Service postmark on the envelope showed that the order to show cause was not processed by the Postal Service until June 12, 1985. The order was received by Nicholas Damer on June 13, 1985.

On June 13, 1985, Nicholas Damer wrote to the participating justices in Division Five, requesting that they consider recusal in this matter as a result of the order to show cause proceedings and other matters. The

three participating justices took offense to this request. Damer's letters also requested a full hearing on the order to show cause and the right to call and confront witnesses and to present all relevant evidence. The three participating justices ignored this request.

On June 20, 1985, Nicholas Damer associated William Flenniken, Jr. as counsel of record in this matter for purposes of arguing the merits of the appeal at oral argument and the order to show cause re sanctions. On that same date William Flenniken, Jr. wrote to the participating justices enclosing a copy of a recent decision, Fegles v. Kraft [(1985) 168 Cal.App.3d 812] which appeared in the June 13 issue of the Los Angeles Daily Recorder. In that letter, it was respectfully urged that in Fegles,

a similar sanctions order pursuant to Code of Civil Procedure section 128.5 was overturned by the appellate court because the order in question:

> ". . . did not `recite in detail the conduct or circumstances justifying the order'. The court must state the specific circumstances giving rise to the award of attorneys' fees and state with particularity the basis for finding those circumstances amount to `tactics or actions not based on good faith which are frivolous or which unnecessarily delay.' The court's written order should be more informative than a recitation of the words of the statute."

William Flenniken's letter also requested that the oral argument set for July 2, 1985, be vacated and that he be permitted to file a supplemental brief addressing the impact of the Fegles decision on the issues involved in this matter. No action was taken on this

request, nor was the Fegles decision mentioned in the opinion ultimately issued by the Court of Appeal.

At some time presently unknown to Petitioners, the Court of Appeal brought up the trial court's entire file of this matter. Footnote 1 of the Opinion states:

> "The record furnished by the parties was inadequate for review of the issues involved herein. The documents and transcripts provided referred to and encompassed other pleadings and documents on file. To ensure adequate review we have augmented the record on our own motion pursuant to Rule 12, subdivision (a) to obtain the original court file."

No order written or oral so augmenting the record was ever made by the Court of Appeal. Neither Nicholas Damer nor William Flenniken, Jr. had any

knowledge that the record on appeal had been augmented to include the trial court files until the oral proceedings on July 2, 1985 had already commenced. The fact that the record on appeal had been augmented to include the entire trial court files came out during the oral proceedings on July 2, 1985. Mr. Justice Haning inquired whether or not William Flenniken, Jr. had read the trial court's file. William Flenniken, Jr. replied that he had not read the trial court's file but had studied the record on appeal designated by the parties in preparation for the order to show cause proceedings and the oral argument on the merits. William Flenniken, Jr. then inquired from Mr. Justice Haning whether the record on appeal had been augmented to include the trial court files. Mr. Justice Haning responded that the record had been

augmented to include the trial court files.

On September 30, 1985, Division Five of the First Appellate District of the Court of Appeal filed its opinion in this matter. (Appendix A, page 1.) The Court declined to determine whether or not the trial court's sanctions order complied with Code of Civil Procedure §128.5 because the Court ruled that the sanctions had not necessarily been imposed pursuant to CCP §128.5, even though the sanctions could only have been awarded pursuant to CCP §128.5, and opposing counsel admitted that the sanctions were awarded pursuant to CCP §128.5, and the trial judge indicated he was acting under CCP §128.5. The Court further found that Petitioners had taken a frivolous appeal. (Opinion, page 9) An additional $2,500.00 sanction was

imposed, because the Court of Appeal found this figure to be the "reasonable value" of Respondent's attorneys' services in opposing an appeal from a $750.00 sanctions order. (Opinion, page 9, footnote 9.)

Thereafter, on October 15, 1985, a timely Petition for Rehearing was filed in the Court of Appeal, pointing out the numerous mistakes in fact and law reflected in the Court of Appeal's opinion. The Petition was denied on October 25, 1985.

A timely Petition for Review was filed with the California Supreme Court on November 12, 1985. Later, on December 30, 1985 that Petition was denied without opinion. (Appendix A, page 35.) Upon denial of the Petition for Review, the remittitur issued from the Court of Appeal on January 13, 1986.
page 65.)

REASONS FOR GRANTING WRIT

A. THE WRIT SHOULD BE GRANTED BECAUSE THE CALIFORNIA SUPREME COURT HAS DECIDED THREE IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT (Rule 17.1.(c))

1. The First Important Question.

The first important question of federal law relates to Petitioners' fundamental due process right under the Fourteenth Amendment to be informed of the nature and extent of the appellate record upon which an appellate court will rely in deciding the issues presented to it on appeal. The right to such knowledge is an integral part of the fundamental due process right of notice and opportunity to be heard.

No case has been found which places this fundamental right squarely

upon federal constitutional grounds. This case presents that opportunity. Without knowledge of the nature and extent of the record to be relied on by the Court of Appeal, Petitioners were unable to properly address the issues on appeal, either in their briefs or in their oral argument. Without such knowledge, the appellate process is reduced to a farce or a sham.

There are only two fundamental ways which the records in the trial court may be brought to the appellate court for review. The federal procedure illustrates one way. Under the federal procedure, the entire record in the trial court is made the record on appeal, with the parties calling the court's attention to particular documents by way of appendix. (See Rule 10(a) and Rule 30(a), Federal Rules of Appellate Procedure)

Under this procedure, all of the parties are given notice that the potential record on appeal is coextensive with the trial court records. See Chapman v. Rudd Paint & Varnish Co. (1969, CA9 Wash.) 409 F2d 635, declaring that under Rule 10(a) all of the original papers and exhibits filed in the District Court are part of the record on appeal whether or not brought before the Court of Appeal. Indeed, Rule 30(a) specifically states: "The fact that parts of the record are not included in the Appendix shall not prevent the parties or the court from relying on such parts."

The other method, and that used in California and many other states, provides that the record on appeal consists only of those portions of the record in the court below specifically designated by the parties and transmitted

to the reviewing court.

The California procedure recognizes that the parties might not designate all of the trial court proceedings which may arguably be relevant to a determination of the issues. For that reason, Rule 12(a) provides in relevant part:

> "On . . . the judge's own motion, a judge of the reviewing court, on such terms as are deemed proper, may order that any part of the original Superior Court file, including any paper or record on file or lodged with the Superior Court, be transmitted to it, . . . and when so transmitted they shall be deemed a part of the record on appeal. The clerk of the reviewing court shall mail each party a copy of any augmentation order."

In the present case, no written order was made regarding augmentation and no other meaningful advance notice of augmentation was given. The California

Supreme Court has determined in this action that there is no federal constitutional due process right to knowledge of the contents of the record on appeal prior to the submission and determination of the issues. The California Supreme Court, by declining to review this issue, has approved a procedure whereby no written order reflects the reviewing court's sua sponte augmentation of the record on appeal, and whereby the parties to the appeal are not given such notice in any other manner.

A decision of this Court placing the right to knowledge of the contents of the record on appeal on a fundamental federal due process footing is required for the protection of parties in the appellate courts of California as well as those other states following a substantially similar procedure, such as

Alaska, Arkansas, Colorado, Idaho, Indiana, and Maryland, to name only a few.

2. The Second Important Question.

The second important question of federal law which has not been but should be settled by this Court relates to the fundamental fairness of the methods by which California courts, and the appellate courts of other states following a similar practice, punish parties for prosecuting frivolous appeals.

The California Legislature has provided no procedure by which punishment may be imposed for frivolous appeals. Thus, it is left to each reviewing court to devise a process for the imposition of such punishment. Here, this particular

division of this particular Court of Appeal elected to proceed by an order to show cause re frivolous appeal. That hearing was set at the same time as the oral argument on the merits of the case, and was actually scheduled, on the docket, to occur before oral argument on the merits. Such a process is fundamentally unfair because a party charged with showing cause why sanctions should not be imposed for a frivolous appeal does not have the benefit of the opinion of the appellate court deciding the merits of the appeal prior to preparing and presenting a defense against the order to show cause. Such procedure violates a fundamental federal due process right to meaningful notice and a meaningful opportunity to be heard in defense against the punitive sanctions. Unless the reasoning process

of the appellate court is known prior to the time the defense to the order to show cause is prepared and presented, a party charged with prosecuting a frivolous appeal has no knowledge of the reasoning of the appellate court upon which to prepare and present a defense. See generally Mission Denver Co. v. Pierson (1984, Colo.) 674 P.2d 363; and In Re Marriage of Flaherty (1982) 31 Cal.3d 637, 183 Cal.Rptr. 508, 646 P2d 179.

3. The Third Important Question.

The third important question arises as a corollary of the first and second questions. Damer and Bauer were punished without knowing prior to the commencement of the order to show cause proceedings that the record on appeal had secretly been augmented by the Court.

Therefore, they did not have the basic notice and opportunity to prepare and present a defense which is required by the Fourteenth Amendment. The imposition of monetary sanctions for a so-called frivolous appeal pursuant to the order to show cause proceedings, where the appellate court has sua sponte augmented the record on appeal without notice to the party ordered to show cause, violates the Fourteenth Amendment due process requirement of notice and opportunity to be heard.

B. THE WRIT SHOULD BE GRANTED BECAUSE THIS ACTION MEETS THE PROCEDURAL REQUIREMENTS FOR A WRIT OF CERTIORARI

1. There Is A Final Judgment Of The Highest State Court In Which A Decision Could Be Had.

Under the California procedure, the highest court in which Petitioner could

appeal as a matter of right is the Court of Appeal of the State of California. Thereafter, California procedure provides an opportunity for review in the California Supreme Court by petition for writ of review. (Rule 29, California Rules of Court) The petition for writ of review is a discretionary writ much like that of certiorari. Following proceedings in the California Court of Appeal, Petitioners filed a timely petition for writ of review in the California Supreme Court raising the issues presented herein which was denied on December 30, 1985. (See Appendix A, page 35.) Following denial of the petition for writ of review, the Court of Appeal issued its Remittitur on January 13, 1986 in light of the conclusion of California appellate review.
page 65.)

2. The Federal Questions Were Raised In A Timely Fashion In the State Courts.

The first issue regarding the Court of Appeals secret augmentation of the record on appeal prior to the time the cause was submitted for determination, was raised in the Court of Appeal at the first opportunity in a petition for rehearing timely filed in the Court of Appeal on October 15, 1985, and denied on October 25, 1985. (Appendix A, page 20.) This issue was also raised in the petition for review in the California Supreme Court.

The second issue relating to the denial of due process by reason of the combined order to show cause re frivolous appeal and oral argument of the merits of the appeal, was raised in both the Court of Appeal and the California Supreme

Court. On June 13, 1985, the date that the order to show cause re frivolous appeal was received by Nicholas Damer, he wrote a letter to the Court stating inter alia, "I request a full hearing on the OSC, and the right to call and confront witnesses and to present all relevant evidence." A necessary concomitant of a full hearing, the right to call and confront witnesses, and to present all relevant evidence, is having a copy of the appellate court's opinion in order to prepare to meet the charges set forth in the order to show cause. This ground was also presented to the California Supreme Court in the petition for review.

The third issue regarding Petitioner's inability to prepare and present a defense in the order to show cause proceedings wherein the record on appeal has been secretly augmented prior

to the order to show cause proceeding without knowledge of the parties, was raised in the Court of Appeal on June 13, 1985, in Mr. Damer's letter of that date referred to above. This federal question was also presented to the California Supreme Court in the Petition for Review.

3. There Are No Independent State Grounds Upon Which The Decision May Be Based.

It is well accepted that the Supreme Court of the United States will not review a decision of a state court resting upon adequate and independent non-federal grounds. Admittedly, in this action, the issues were presented to the state courts on the basis of both the California and the federal constitutional provisions. However, if the federal and non-federal grounds of decision are so interwoven as not to be independent, the

Supreme Court does have jurisdiction to decide the federal question presented in the case. See generally Abie State Bank v. Bryan (1931) 282 US 157, 75 L.Ed 690, 51 S.Ct 252.

Here, the federal and non-federal grounds are so interwoven. The Petition for Review presented all issues to the California Supreme Court on the basis of both the federal and California constitutional provisions. Therefore, the California Supreme Court was required to review the issues under both constitutional provisions. If the California Constitution precluded such conduct, the federal question would never be reached. If, however, the California Constitution did not preclude such conduct, the Court is required to reach the federal question. The California Supreme Court declined to hold that the

procedures applied by the appellate court were constitutionally improper under either constitutional provisions. In reviewing the procedures, the California Supreme Court must enforce the minimum due process requirements of the Fourteenth Amendment. By determining to deny review of the procedures applied in this matter, the California Supreme Court determined that the procedures applied herein met the minimum constitutional standard imposed by the Fourteenth Amendment. Therefore, ultimately the decision of the California Supreme Court rested upon federal constitutional grounds.

4. The California Supreme Court Determined The Federal Questions Presented In This Petition.

In order for a state court case to be reviewed in the Supreme Court, it must

appear from the record that a federal question was decided by the state courts, or that the judgment rendered could not have been given without deciding the federal question. The record must show expressly, or by necessary implication, that a federal question was actually decided by the state courts adversely to the appellant or petitioner in the United States Supreme Court.

Here, as previously seen immediately above, the opinion of the Court of Appeal could not be permitted to stand by the California Supreme Court without a determination by the California Supreme Court that the proceedings relating thereto were consistent with federal notions of due process under the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

_____

By William Flenniken, Jr.
Attorney for Petitioners

[NOT TO BE PUBLISHED IN OFFICIAL REPORTS]
[Filed September 30, 1985]

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

COASTSIDE PUBLISHERS
AND PRINTERS, et al.,
Plaintiffs and Respondents,
vs.
EDWARD M. BAUER,
Defendant and Appellant.

A025325
San Mateo County
Superior Court No. 267891

OPINION

Defendant/appellant Edward M. Bauer and his attorney, Nicholas Damer, appeal an order imposing sanctions of $750 for bad faith and frivolous issuance of a subpoena duces tecum. We affirm.

This appeal originates in a libel action by plaintiffs/respondents Coastside Publishers and Printers, a

Partnership, Daniel Depp, and Deanna Thrift (collectively respondents) against Bauer and others. The action literally commenced with name calling and rapidly went downhill from there. Due primarily to appellants' unique style of advocacy, the law and motion calendar became the main battlefield, where compromise, accomodation, professional courtesy and just plain common sense became lost in a siege of needless paper and vindictive rhetoric.[1] Appellants perceived themselves as the innocent victims of a conspiracy among devious plaintiffs, unethical lawyers and corrupt judges to deprive them unlawfully and maliciously of their property in violation of due process. The most insignificant issues and procedures were elevated to the status of constitutional crises. What

would ordinarily have been a straightforward case mushroomed into five volumes of clerk's files, peppered with rude, insulting and threatening letters from appellants to opposing counsel and the court.[2] Within this framework, the present dispute arose.[3]

During the course of the pending action, respondents timely served interrogatories on Bauer. The zip code on the mailing envelope was 94108; the one on the proof of service was 94018. Appellants seized upon this typographical discrepancy as a fundamental defect which rendered the interrogatories legally deficient, thus eliminating their need to respond. Respondents moved to compel answers and requested attorneys fees for the eight hours expended by their attorney, Arthur Leinwohl, in effecting

responses. Leinwohl declared his hourly rate was $125, and as verification attached a current billing to a client unconnected with the instant action, the Chubb Grour Insurance Company. Appellants did not respond to the motion to compel, but served notice of the deposition of two Chubb employees together with a subpoena duces tecum requiring, inter alia, all correspondence related to the litigation reflected in the billing. Issuance of the subpoena was supported by Damer's declaration, which referred to contacts between Leinwohl and Bauer's insurer, and suggested that such contact impinged on Bauer's rights of confidentially [sic]. Attached to Damer's declaration, which he served on Leinwohl's client, were copies of correspondence between Damer and the

State Bar concerning disciplinary action of a lawyer not involved with the instant action because that lawyer had contacted the opposing client's insurance company.[4]

Respondents moved to quash the subpoena duces tecum and notice of deposition, to strike Damer's declaration in support thereof, for a protective order and for sanctions. Attached to their notice of motion were declarations and points and authorities detailing the reasons for which the sanctions were being sought. Appellants responded with Damer's declaration and points and authorities. The trial court, after hearing and granting the motion to quash, stated: "I see [an] act of bad faith in attaching [information about the disciplinary procedure and Leinwohl's

contact with Bauer's insurance carrier] to the subpoena duces tecum combined with [a] frivolous position with respect to the seeking of the information from the Chubb Group under the circumstances presented by this case," and imposed sanctions of $750.

Aside from the inherent power of the court to regulate and control its proceedings (see 2 Witkin, Cal. Procedure (3d ed. 1985) Courts, §137, et seq.) at least four separate statutes[5] confer authority to impose sanctions, including attorney fees, for conduct such as that sanctioned in the instant case. They are sections 128.5, 1987.2, 2019, subdivision (b)(1) and 2034, subdivision (d).

Section 1987.2 provides, in relevant part: "In making an order pursuant to motion made under . . . Section 1987.1,

the court may in its discretion award the amount of the reasonable expenses incurred in making or opposing the motion, including reasonable attorneys' fees, if the court finds the motion was made or opposed in bad faith or without substantial justification or that one or more of the requirements of the subpoena was oppressive." (Section 1987.1 is the statutory authority for quashing a subpoena or subpoena duces tecum.) Section 2019, subdivision (b)(1) grants authority to impose costs and expenses, inluding attorney fees, when granting a motion for protective order. Section 2034, subdivision (d) permits sanctions for improperly failing to answer interrogatories. These statutes have regularly been employed to control abuses in the discovery process. (See, e.g.,

Calvert Fire Ins. Co. v. Cropper (1983) 141 Cal.App.3d 901; In re Marriage of Lemen (1980) 113 Cal.App.3d 769; Flynn v. Superior Court (1979) 89 Cal.App.3d 491; Fred Howland Co. v. Superior Court (1966) 244 Cal.App.2d 605; Rosen v. Superior Court (1966) 244 Cal.App.2d 586.)

Appellants' refusal to answer interrogatories because of what was obviously only a typographical error gave rise to not one, but two unnecessary proceedings: the motion to compel and the motion to quash. Rather than file an objection to respondents' motion to compel and their claim for attorney fees, appellants subpoenaed privileged documents unrelated to the subject matter of the instant action[6] from a Leinwohl client (Chubb Insurance Group) not in any way connected to the instant action, and noticed the

deposition of two uninvolved Chubb employees. By including irrelevant information about Leinwohl's contact with Bauer's insurer in his declaration and his letters to the State Bar, Damer implied to Chubb that Leinwohl violated ethical standards, an implication potentially damaging to Leinwohl's relationship with his client. Appellants' apparent purpose in subpoenaing the documents of unrelated litigation was to ascertain that Leinwohl's declaration of his hourly rate, for purposes of attorney's fees, was accurate. However, it is the province of the trial court, if it deems attorney's fees are justified, to decide what fees are reasonable (County of Madera v. Forrester (1981) 115 Cal.App.3d 57, 65); it uses the attorney's rate only as a guideline.

Therefore, appellants would have no need of the Chubb-Leinwohl documents. Furthermore, in seeking all correspondence relating to litigation handled by Leinwohl for a client in extraneous proceedings, appellants were seeking privileged material. (Evid. Code, §950, et seq.) The purpose of the discovery legislation was to eliminate "game playing" and expedite the resolution of the real issues involved in litigation. Sanctions were included to enforce this purpose. (See Lund v. Superior Court (1964) 61 Cal.2d 698; Greyhound Corp. v. Superior Court (1961) 56 Cal.2d 355.) We agree with the trial court that under these circumstances appellants' issuance of the subpoena duces tecum was in bad faith and frivolous. We find no abuse of its discretion in awarding sanctions.

Overlooking the foregoing authority for the sanctions, appellants contend the order is defective for failure to comply with section 128.5. Section 128.5, subdivision (a), grants the trial court power "to order a party or the party's attorney, or both, to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of tactics or actions not based on good faith which are frivolous or which cause unnecessary delay." Subdivision (b) states, in pertinent part: "An order imposing expenses shall be in writing and shall recite in detail the conduct or circumstances justifying the order." The question raised is whether the instant order, which states that sanctions of $750 shall be imposed "for bad faith and frivolous issuance of subpoena duces tecum," is sufficiently detailed.

We need not address this issue. The order being appealed does not recite statutory authority for its issuance, and we do not presume it was based on section 128.5. However, even basing it on section 128.5 would not impair its validity. "`The fact that the action of the court may have been based upon an erroneous theory of the case, or upon an improper or unsound course of reasoning, cannot determine the question of its propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.' [Citation.]" (D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1, 18-19.)

Respondents did not rely exclusively on section 128.5 in their motion for sanctions, but also urged section 1987.2. The court quashed the subpoena and also indicated its displeasure with appellants concerning their announced reasons for failing to respond to the interrogatories. Its comments, the problem it was addressing and its order indicate it was relying on the traditional discovery sanctions (§§1987.2, 2019, subd. (b)(1) and 2034, subd. (d) rather than section 128.5. Unlike section 128.5, sections 1987.2, 2019, subd. (b)(1) and 2034, subd. (d) do not require specific written detail when sanctions are ordered.[7]

On our own motion we issued an order to show cause why sanctions should not be imposed against appellants for taking a frivolous appeal which has no merit and

is solely for delay.[8] (Code Civ. Proc., §907; Cal. Rules of Court, rule 26(a); In re Marriage of Flaherty (1982) 31 Cal.3d 637.) After a hearing on the merits of our OSC, we conclude that a penalty of $2,500 should be imposed on appellants.[9] Their position on the effect of the typographical error in one of the proofs of service, their attempt to obtain clearly privileged information via the subpoena duces tecum, their deliberate interference with the attorney/client relationship between Leinwohl and the Chubb Group and, in fact, their entire conduct was so outrageous that sanctions were demanded.[10] In our opinion, the trial court exercised admirable restraint. No reasonable attorney could entertain a valid belief that an appeal from the order for sanctions was warranted.

H.L. Menken made the philosophical observation that "injustice is relatively easy to bear; what stings is justice." Appellants' real problem is that they have been stung.

Judgment affirmed. Respondents are awarded sanctions on appeal in the sum of $2,500 to be recovered as additional costs against appellants.

HANING, J.

We concur:

LOW, P. J.

KING, J.

A025325
Coastside etc., et al. v. Bauer

[1]. The record furnished by the parties was inadequate for review of the issues involved herein. The documents and transcripts provided referred to and encompassed other pleadings and documents on file. To ensure adequate review we have augmented the record on our own motion pursuant to Rule 12, subdivision (a) to obtain the original court file.

[2]. As examples of the correspondence campaign we note the following:

(1) A letter from Damer to respondents' attorneys threatening to sue respondents and their attorneys for malicious prosecution unless their complaint was dismissed with prejudice within 10 days.

(2) A letter from Damer to one of respondents' attorneys advising he will no longer communicate with nor respond to pleadings filed by co-counsel.

(3) A letter from Damer to respondents' attorneys accusing them of professional misconduct and threatening to report them to the State Bar.

(4) A letter from Damer to the presiding judge threatening to report another judge to the Commission on Judicial Performance unless appellants were granted a second pre-arbitration conference. (Damer felt the pre-arbitration conference judge acted improperly by not referring the case to arbitration because, in Damer's opinion, the case had little or no value. The ultimate jury verdict was $680,000. Apparently the judge had a pretty fair handle on the situation.)

(5) A letter from Damer to the presiding judge, reminding the judge that Damer had supported him in his electoral campaign for the municipal court.

(6) A follow-up letter to the above, wherein Damer furnishes the presiding judge with a copy of a cancelled check for $10.00 as Damer's financial contribution to the judge's municipal court campaign. In this correspondence he advises the judge that his campaign support was "more of a moral nature than of significant financial substance," and given "for purposes of improving our local court system. . . ." The reason for the latter two letters escapes us entirely. They are wholly inappropriate and serve no legitimate purpose.

[3]. We do not refer in our remarks to co-counsel who entered the case at the appellate level, and who has performed in a professional and competent manner.

[4]. As further example of how this litigation was conducted, appellants refused to provide copies of the subpoenas and attachments to respondents' counsel. When respondents' counsel asked for copies they were told they were not entitled to them.

[5]. Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

[6]. Code of Civil Procedure section 2016, subdivision (b) states, in pertinent part: "[T]he deponent may be examined regarding any matter . . . which is relevant to the subject matter involved in the pending action . . . ."

[7]. Section 128.5 was entered in response to Bauguess v. Paine (1978) 22 Cal.3d 626. (Stats. 1981, ch. 762, §2; O'Brien v. Cseh (1983) 148 Cal.App.3d 957, 961; Ellis v. Roshei Corp. (1983) 143 Cal.App.3d 642, 648.) Bauguess dealt with an award of sanctions rendered in the absence of statutory authority, and

disapproved the same as an exercise of the court's supervisory power. The legislature abrogated the Baugess ruling and expanded the trial courts' powers to control the abuse of frivolous litigation through the award of monetary sanctions. (City of Long Beach v. Bozek (1982) 31 Cal.3d 527, 537, judgment vacated and caused remanded (1983) 459 U.S. 1095 [74 L.Ed.2d 943; 103 S.Ct. 712], reiterated (1983) 33 Cal.3d 727.) As such, section 128.5 is directed at conduct which is not otherwise specifically proscribed or covered by statute. Hence, the detailed order serves a valid purpose -- it notifies the parties involved of the specific conduct being punished and furnishes a record for review. The necessity for such detail evaporates when conduct is already prohibited by existing statutes granting authority for such sanctions, such as sections 1987.2, 2019, subd. (b)(1) and 2034, subd. (d).

[8]. Appellant Damer's response to our order to show cause was another insulting, threatening and accusatory letter to the court, demonstrating a lack of knowledge of the actual facts discussed therein and little or no skill in the art of practicing law. A simple letter brief addressed to the merits of the issue would have sufficed. We have declined to issue another OSC re contempt because of his counsel's apology.

[9]. This represents the reasonable value of respondent's time in responding to the appeal.

[10]. Appellant Damer defends his actions as "diligent advocacy." We can only suggest a review of Justice Gardner's observations in People v. Eckstrom (1974) 43 Cal.App.3d 996, at pages 1002-1003.

The diligent advocate knows where the goal line is and that the ultimate objective is to win the lawsuit or obtain as favorable a settlement fot the client as possible. He doesn't waste his time running wide on third and one when he is three points behind and time is expiring.

[ENTERED]
[Filed October 25, 1951]

COURT OF APPEAL
OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIRST APPELLATE DISTRICT
DIVISION FIVE

COASTSIDE PUBLISHERS
AND PRINTERS, et al.,
Plaintiffs and Respondents,
vs.
EDWARD M. BAUER,
Defendant and Appellant.

A025325
San Mateo County
Superior Court No. 267891

BY THE COURT:

The petition for rehearing is denied.

Dated Oct 25 1985

/s/
Low P. J.

UNITED STATES CONSTITUTION

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CALIFORNIA CONSTITUTION

ARTICLE I

Section 1. Inalienable rights

All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness and privacy.

Adopted November 5, 1974.

CALIFORNIA CONSTITUTION

ARTICLE I

Section 7. Due process; Equal protection; Privileges and immunities

(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment of the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other

provision of this Constitution, no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law t impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th amendment of the United States Constitution.

Except as may be precluded by the

Constitution of the United States, every existing judgment, decree, writ, or other order of a court of this state, whenever rendered, which includes provisions regarding pupil school assignment or pupil transportation, or which requires a plan including any such provisions shall, upon application to a court having jurisdiction by any interested person, be modified to conform to the provisions of this subdivision as amended, as applied to the facts which exist at the time of such modification. In all actions or proceedings arising under or seeking application of the amendments to this subdivision proposed by the Legislature at its 1970-80 Regular Session, all courts, wherein such actions or proceedings are or may hereafter be pending, shall give such actions or proeedings first precedence over all

other civil actions therein.

Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after the effective date of this subdivision as amended.

In amending this subdivision, the Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to

participate in the educational process, preserving harmony and tranquility in this state and its public schools, preventing the waste of scarce fuel resources, and protecting te environment.

(b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked.

§128.5 [Payment of expenses attributable to delaying tactics]

(a) Every trial court shall have the power to order a party or the party's attorney, or both, to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of tactics or actions not based on good faith which are frivolous or which cause unnecessary delay. Frivolous actions or delaying tactics include, but are not limited to, making or opposing motions without good faith.

(b) Expenses pursuant to this section shall not be imposed except on notice

contained in a party's moving or responding papers; or the court's own motion, after notice and opportunity to be heard. An order imposing expenses shall be in writing and shall recite in detail the conduct or circumstances justifying the order. [1981 ch 762 § 1.]

[In effect 1/1/82 to 1/1/85]

THIS PAGE LEFT INTENTIONALLY BLANK

Rule 12. Augmentation and correction of record

(a) [Augmentation] On suggestion of any party or on the judge's own motion, a judge of the reviewing court, on such terms as are deemed proper, may order that any part of the original superior court file, including any paper or record on file or lodged with the superior court, be transmitted to it, or that portions of the oral proceedings be transcribed, certified and transmitted to it, or that an agreed or settled statement of portions of the oral proceedings be prepared and transmitted to it; and when so transmitted they shall be deemed a part of the record on appeal. The clerk of the reviewing court shall

mail each party a copy of any augmentation order.

Subd (a) amended effective July 1, 1981.

Rule 29. Grounds for review in Supreme Court

(a) [Grounds] Review by the Supreme Court of a decision of a Court of Appeal will be ordered (1) where it appears necessary to secure uniformity of decision or the settlement of important questions of law; (2) where the Court of Appeal was without jurisdiction of the cause; or (3) where, because of disqualification or other reason, the decision of the Court of Appeal lacks the concurrence of the required majority of qualified judges.

(b) [Limitations] As a matter of policy, on petition for review the Supreme Court normally will not consider:

(1) any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal;

(2) any issue or any material fact that was omitted from or misstated in the opinion of the Court of Appeal, unless the omission or misstatement was called to the attention of the Court of Appeal in a petition for rehearing. All other issues and facts may be presented in the petition for review without the necessity of filing a petition for rehearing.

[Filed December 30, 1985]

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

1st District, Division 5, No. A025325

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

COASTSIDE PUBLISHERS AND PRINTERS
et al., Respondents,

v.

BAUER, Appellant.

Appellant's petition for review DENIED.

7th day of January A.D. 1986

/s/
Deputy Clerk

/s/
Chief Justice

[Filed June 11, 1985]

COURT OF APPEAL
OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIRST APPELLATE DISTRICT
DIVISION FIVE

COASTSIDE PUBLISHERS
AND PRINTERS, et al.,
Plaintiffs and Respondents,
vs.
EDWARD M. BAUER, et al.,
Defendants and Appellants.

A025325
San Mateo County
Superior Court No. 267891

BY THE COURT:

Appellant's counsel, Nicholas Damer, is ordered to show cause before Division Five of this court on Tuesday, July 2, 1985 at 11:00 a.m. why sanctions for maintaining an appeal that is frivolous or taken solely for delay, should not be

imposed on him (Civ. Proc. Code section 907: California Rules of Court, rule 26(a)). Mr. Damer is ordered to appear in order to ensure a full hearing on this matter, unless he agrees to submit this issue without a hearing.

Counsel for respondent is not required to be present at this public proceeding, but is welcome to attend if appellant's counsel does not notify the court he wll submit the issue without a hearing.

Dated June 11, 1985

/s/
Low P. J.

Received
Jun 17 1985
Court of Appeal
First Appellate District

DAMER & STRYKER
LAWYERS
Post Office Box 321
321 El Granada Boulevard
El Granada, California 94018
(415) 726-5588

June 13, 1985

Honorable Harry Low, Presiding Justice
Court of Appeal of the State of
California
First Appellate District, Division 5
350 McAllister Street
San Francisco, CA 94102

Subject: Civil Appeal No. A025325 Coastside Publishers et al. v. Bauer, et al.; San Mateo County Superior Court No. 267891; REQUEST TO CONSIDER RECUSAL; UPDATING OF BRIEFS

Dear Presiding Justice Low:

Fourteen years ago this day, I left a now enslaved Southeast Asian nation and an American war said to be pursued to insure the preservation of liberty both there and here. In an amazing irony, I today received notice from an American judge that I am about to be deprived of the due process of law here in my homeland.

I attach a copy of a document bearing your facsimile signature notifying me that I am to appear at the same time that oral argument is scheduled on the merits of an appeal, and there to simultaneously

show cause why sanctions should not be awarded against me for maintaining the appeal. Presumably, the oral argument on the merits, scheduled for July 2, 1985, was to be addressed to a panel of Justices with open minds. Presumably, as of June 6, 1985, in accord with the attached CALENDAR NOTICE, "Each Justice of this division has read the briefs, is familiar with the facts and law, and has had the benefit of independent research." However, despite the claimed familiarity with the merits of the appeal as of June 6, 1985, your Division did not send out the order to show cause regarding sanctions until after I requested oral argument on June 11, 1985; and although the order to show cause reflects a filing date of June 11, 1985, it was not postmarked until June 12, 1985, and was not received here until June 13, 1985.

(Please see the attached copy of the involved envelope; please note that your clerk's postal meter was undeniably outdated, and there is thus reason to believe that the filing stamp was at least one day out of date as well.)

These coicidences generate the unavoidable impression that sanctions are threatened unless one waives one's right to oral argument. Even worse, these circumstances demonstrate that an appellant such as myself simply can have no hope of a fair and impartial hearing before the involved panel, as guaranteed under the Constitutions of this State and of the United States. At the very least, these events compel the conclusion that oral argument will be deemed an offensive frivolity by the Court and will be offered in fateful futility by the

appellant.

It is difficult to believe the June 6, 1985 computer-generated statement that you had "read the briefs" and are "familiar with the facts and law". An attentive review of the briefs might instead result in questioning and punishing Respondent's counsel's false and unrecanted representations to your Court, as noted in my Reply Brief. In fact, although the Opening Brief, Respondent's Brief and Reply Brief altogether total only thirty-three pages of text, your workload and priorities may have prevented you from even spending thirty-three minutes on this matter, much less the time necessary to analyze the situation thoroughly. Instead, perhaps some law student extern's memo has pre-determined my fate; this does not insure

due process.

Because your apparent opinions of me might adversely affect my client, and because you have now placed me in a position equivalent to that of a criminal defendant, I may be required to associate two additional attorneys in this matter--one to go through the motions of arguing the merits of the appeal, and the other to defend my actions in pursuing the appeal. Unfortunately, I cannot compel disqualification of you or anyone else on you panel; (see Kaufman v. Court of Appeal (1982) 31 Cal.3d 933, 184 Cal.Rptr. 302). This is so even though I just learned that the trial court judge served "pro tempore" in your very division while this appeal has been pending, and even though one panel member's former law firm was extremely

active in the involved judge's initial election campaign (this fact is reflected in the trial court's file; see copy of attached letter to the involved judge.) Even though the third Justice's last dealings with me were as an opposing party's lawyer, he is the only one before whom I feel I now have even a chance of receiving a reasonably impartial hearing free of the prejudice reflected in the order to show cause you signed, and free of sympathy arising from judicial collegiality. Under these circumstances, perhaps you and one or more of the other panel members may wish to recuse yourselves (Kaufman, supra.) Prior to the order to show cause, I may have been willing to risk the absence of disinterested impartiality; now I cannot afford to be naive, particularly since the involved trial judge seems to be

intensely interested in this appeal (he asked me about it less than a month ago) and, nine months ago, after gratuitously insulting me in open court in front of another client (see copy of related transcript, attached) he spoke to me privately in his chambers, where I objected to his impromtu attack, and he said, in reference to the subject of this appeal, that his recent "pro tempore" service with you had convinced him that appellate justices similarly seek to accomplish their idea of "justice", and do not allow technical requirements of the law to "get in the way". In my opinion, such sentiments and practices reflect the rule of men, not the rule of law. I reminded the involved judge--whom I respect and who is usually well-intentioned although occasionally hasty and intemperate--that a resigned former

President likewise justified circumvention of the law by citing his honorable objectives. In any event, I will not waive oral argument in this case, on either the appeal or the related order to show cause, regardless of the personal consequences; in fact, I request a full hearing on the OSC, and the right to call and confront witnesses and to present all relevant evidence. The trial court's CCP §128.5 sanctions order occurred as a direct consequence of my demands for due process--including the right to challenge documents offered by opposing counsel in an initial attempt to obtain sanctions against my client and myself, and the right not to see my client victimized by ex parte proceedings. The sanctions order, of the trial court, does not meet the due process requirements specified by the

Legislature, and although this point of law is undeniably correct in light of O'Brien v. CSEH (1982) 148 Cal.App.3d 957, 960, 198 Cal.Rptr. 409, 411 (see page 7 of my Opening Brief, copy attached) you have nevertheless decided that the appeal is "frivolous or taken solely for delay."

There is no honorable reason for me to give up the quest for due process at this point in time. If liberty is forever lost, in Southeast Asia or America, it will most likely slip from our grasp gradually, and in small increments, because each of us did not have the courage and resolve to keep a firm grip and a vigilant eye, so as to prevent either the foreign or domestic abuse of power. If my children or my children's children are not free, it will not result

from my fear of insisting on due process, even from judges. You may do what you will with the sanctions order you have reviewed and the sanctions order you threaten, but I will not acquiesce to the slow erosion of the rule of law, order by order, case by case, appeal by appeal.

In light of these developments, not only does the Superior Court's ruling involve an important question of law for the trial bar, but the Court of Appeal's actions also raise significant issues of statewide importance likewise arising from judicial actions which stifle thorough and aggressive advocacy. Therefore, please make this letter and its attachments part of the record on appeal, so that all necessary appellate remedies can be exhausted.

Sincerely,

/s/

Nicholas Damer

cc: Associate Justice Donald King; Associate Justice Zerne Haning; Hon. V. Gene McDonald; Arthur Leinwohl/Constance Phipps

P.S. The June 6, 1985 CALENDAR NOTICE also indicated that briefing could be updated with a letter regarding new cases. I therefore cite the following. Please see Corralejo v. Quiroga (1984) 152 Cal.App. 3d 871, 199 Cal.Rptr. 733 (which for some reason does not appear in the January, 1985 Supplement to the Deering's Annotated Code of Civil Procedure, §128.5.) This case cited and followed O'Brien v. CSEH, supra, and

reversed a CCP §128.5 sanctions order for lack of specificity. Please also see Swickard v. Crecelius Ranches, Inc. (1985) 164 Cal.App.3d 1251, 211 Cal.Rptr. 187, 190, where the Court of Appeal's opinion refers to an affirmed CCP §128.5 sanctions order which met the statute's requirements of specificity and a recital "in detail"; compare the content of the order affirmed in Swickard with the nine-word order involved in this case. See also Luke v. Baldwin-United Corporation (April 30, 1985) ___ Cal.App.3d ___, 213 Cal.Rptr. 654, reversing a trial court's award of sanctions against an attorney and discussing the law's interest in protecting zealous advocacy, as noted by the Supreme Court in Marriage of Flaherty (cited in O'Brien, supra.)